Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

PHILIP NARDUCCI, FRANK NARDUCCI
AND JOSEPH LIGAMBI,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

Petition For A Writ Of Certiorari
To The Supreme Court Of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

DONALD F. MANNO, Esquire
Counsel of Record for Petitioners
Kevon Office Center
2500 McClellan Avenue
Suite 140
Pennsauken, New Jersey 08109
(609) 665-6464
Fax (609) 665-1044

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether the unequal application of State statutes (18 Pa. C.S.A. 110-111) and precedent (*Commonwealth v. Smith*, 615 A.2d 32 (1992)) by the Pennsylvania Commonwealth Courts violated the Petitioners rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

PARTIES TO THE PROCEEDING

For purposes of the instant petition for a writ of certiorari, all of the named parties, Philip Narducci, Frank Narducci and Joseph Ligambi are similarly situated. They are raising the same issues and were convicted at the same trial below. They join the instant petition pursuant to Rule 12.4.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners pray for a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania in this case.

OPINION BELOW

The Order of the Supreme Court of Pennsylvania is found at *Commonwealth v. Narducci,* No. 69 E.D. Allocatur DKT 1995 and is reprinted at App. 1. This two line order denys, without opinion, the petition for allowance of appeal to the Pennsylvania Supreme Court. In so doing it allowed to stand the Memorandum Opinion entered by the Superior Court of Pennsylvania in *Commonwealth v. Philip Narducci,* et al. No. 02471, Philadelphia 1994, reprinted at App. 3.

JURISDICTION

The Order of the Pennsylvania Supreme Court was entered on February 27, 1996. This petition for a writ of certiorari is filed within 90 days of that judgment in compliance with Rule 13.1. This Court's jurisdiction is invalid under 28 U.S.C. § 1254(1)

STATUTORY PROVISION INVOLVED

Fourteenth Amendment to the United States Constitution

STATEMENT OF THE CASE

Petitioners were tried in 1989 in the Philadelphia Court of Common Pleas with several other persons. All were convicted of first degree murder. Their appeal to the Pennsylvania Superior Court resulted in the reversal of their convictions, as well as the convictions of the others. This was based upon a pattern of virulent prosecutorial misconduct. See *Commonwealth v. Scarfo*, 416 Pa. Super. 329, 611 A.2d 242 (1992). A retrial was ordered.

Prior to the retrial, Petitioners filed Motions to Dismiss on Double Jeopardy Grounds based upon the Commonwealth of Pennsylvania's decision in *Commonwealth v. Smith*, 532 Pa. 177, 615 A.2d 321 (1992). Following a hearing, these motions were denied at the trial level. An appeal to the Superior Court followed.

On June 5, 1995 a Superior Court panel, in an unpublished memorandum opinion, affirmed the Trial Court and declined to dismiss charges. (App. 3)

Petitioners' Applications for Reargument were denied on August 11, 1995. A Petition to the Pennsylvania Supreme Court was timely filed and on February 27, 1996 was denied. (App. 1)

REASONS FOR GRANTING THE PETITION

THE DENIAL OF REVIEW BY THE PENNSYLVANIA SUPREME COURT ALLOWED TO STAND A LOWER COURT DECISION THAT DENIED THE PETITIONERS EQUAL PROTECTION UNDER THE LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The original murder conviction was reversed because of prosecutorial misconduct, which the Pennsylvania Superior Court characterized as egregious.

> Justice in this case requires reversal for a new trial because the defendants were not properly treated with fundamental fairness.
>
> . . .
>
> However, we do note that given the fervid atmosphere of the trial and the fact that there was arguable merit to the defendant's other contentions of prosecutorial misconduct, we believe the jury was unable to render an objective verdict.
>
> . . .
>
> We can reasonably conclude that the defendants were prejudiced by the prosecutions remarks in aggregate (citations omitted). Such remarks in their number and egregiousness could easily taint the juries ability to reach a verdict objectively.
>
> *Commonwealth v. Scarfo, et al.*, 611 A.2d 242, 284-5 (Pa. Super., 1992). (June 17, 1992)

The Pennsylvania Supreme Court a few weeks (September 18, 1992) subsequent to the reversal of the Petitioner's conviction in *Scarfo, supra* decided *Commonwealth*

v. Smith, 532 Pa. 117, 615 A.2d 321 (1992). There the Court extended the traditional basis for the application of Double Jeopardy to include any situation where prosecutorial misconduct specifically undertook to prejudice a defendant to the point of denying him a fair trail *Commonwealth v. Smith, supra,* at page 196.

> We hold now that the double jeopardy clause of the Pennsylvania Constitution prohibits retrial of a defendant not only when prosecutorial misconduct is intended to provoke the defendant into moving for a mistrial, but also when the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial. at page 186.

It is evident from the clear identity of the language between *Commonwealth v. Smith, supra,* and *Commonwealth v. Scarfo, supra,* that Petitioners were denied the same protection under Pennsylvania law as was granted to the Petitioner in *Commonwealth v. Smith, supra.*

Arbitrary application of state law violates the Equal Protection clause of the Fourteenth Amendment. In *New York City Transit Authority v. Beazer*, 99 S.Ct. 1355, 440 U.S. 568, 59 L.Ed.2d 587 (1979), a right to travel case, this Court noted:

> [The Equal Protection Clause] announces a fundamental principle: the State must govern impartially. General rules that apply evenhandedly to all persons within the jurisdiction unquestionably comply with this principle. at page 1366.

If state law is applied in an "arbitrary" manner then the result is impermissible under the Equal Protection

Clause. *Yick Wo v. Hopkins*, 6 S.Ct. 1064, 118 U.S. 356, 30 L.Ed. 220 (1886). This Court has in *McCoy v. Court of Appeals of Wisconsin, Dist. 1*, 108 S.Ct. 1895, 486 U.S. 429, 100 L.Ed.2d 440 (1988), established that:

> State's enforcement of its criminal laws must comply with the principles of substantial equality and fair procedure that are embodied in the Fourteenth Amendment. at page 1900.

A determination as to the permissible application of a state law under the Equal Protection Clause is separate from the constitutionality of the law. *McLaughlin v. State of Florida*, 85 S.Ct. 283, 290, 379 U.S. 184, 195 (1964). Therefore, even if a law is constitutional in its scope, it may, in its application, violate the Equal Protection Clause. The arbitrary application of Pennsylvania law, as established in *Commonwealth v. Smith, supra*, to Petitioners' claim creates an unequal application of the law and, therefore, violates the Equal Protection Clause of the U.S. Constitution.

This Court has not hesitated to evaluate the application of state law where it applies to indigent criminal defendants. In *Griffin v. People of The State of Illinois*, 76 S.Ct. 585, 351 U.S. 12, 100 L.Ed. 891 (1956), this Court said, "a state may no more discriminate on account of poverty than on account of religion, race or color." at 590. In the context of voting rights, this Court has held in *Reynolds v. Sims*, 84 S.Ct. 1362, 377 U.S. 533, 12 L.Ed.2d 506 (1964) that:

> [T]he concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to

> the governmental action questioned or challenged. [A]ll voters, as citizens of a State, stand in the same relation regardless of where they live . . . [and] . . . [a]ny suggested criteria for the differentiation of citizens are insufficient to justify any discrimination. at page 1383.

The right to vote has been established by this Court as a fundamental right deserving protection under the Equal Protection Clause despite the fact that it is never explicitly mentioned in the Constitution (as is Double Jeopardy). *Harper v. Virginia Board of Education*, 86 S.Ct. 1079, 383 U.S. 663 (1966).

In the context of public education being withheld from children " . . . who are not legally admitted to the United States" *Certain Named and Unnamed Non-Citizens v. Texas*, 101 S.Ct. 12, 13, 448 U.S. 1327, 65 L.Ed.2d 1151 (1980) this Court concluded that:

> . . . a state law which purports to act on any person residing within the State is subject to scrutiny under the Clause (Equal Protection) at page 14.

This Court has also intervened to evaluate the application of a State statute which distributes Veterans benefits unequally. In *Hooper v. Bernalillo County Assessor*, 272 U.S. 612, 105 S.Ct. 2862, 86 L.Ed.2d 487 (1985) a veterans benefit tax exemption case, Chief Justice Burger, delivering the opinion of the Court, wrote:

> When a State distributes benefits unequally, the distinction it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. (footnote omitted). Generally a law will survive that scrutiny if the

> distinction rationally furthers a legitimate State purpose. at page 2866.

In the context a State (Alaska) distributing income derived from its natural resources, this Court has ruled in *Zobel v. Williams*, 102 S.Ct. 2309, 457 U.S. 55, 72 L.Ed.2d 672 (1982) that:

> When a State distributes benefits unequally, the distinction it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment, at page 2312

This Court should, however, evaluate Petitioners' claims using a higher level of scrutiny than that used in cases involving public benefits. This Court has established, in cases such as *Griffin v. State of Illinois, supra*, and *Harper v. Virginia Board of Education, supra*, that fundamental interests can exist, even if they are not independent constitutional rights.

Fundamental rights of citizens (such as Double Jeopardy) are to be afforded a higher standard of protection under the Equal Protection Clause than those involving benefits. *Harper v. Virginia Board of Education, supra.* In *Abney v. United States*, 97 S.Ct. 2034, 431 U.S. 651 (1977) this Court stated that:

> Because of the double jeopardy clause's focus on the "risk" of conviction, the guarantee against double jeopardy assures an individual that, among other things, he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense; it thus protects interests solely unrelated to the

> propriety of any subsequent conviction. at page 2041.

Furthermore, as in *New York City Transit Authority, supra,* it is a "fundamental principle: the state must govern impartially." The Pennsylvania Supreme Court's distinction in the application of the law in this case denys the Petitioners fundamental Double Jeopardy rights. *Scarfo, supra*. These rights have been denied by an application of state law in a manner different than that applied to other citizens of Pennsylvania, specifically as in *Commonwealth v. Smith, supra*.

This arbitrary grant of rights to one citizen, while denying these benefits to another, serves no rational state interest. On the contrary, the legitimate state interest is in the equal application of Double Jeopardy standards.

Petitioners have been unable to find any instance where this Court has undertaken to review the unequal application of a state Double Jeopardy protection. Certainly the instant case is ripe for such review. This court has held in *Robinson v. Elliott,* 89 U.S. 513 (1874) that

> [if a] question has never before been presented to this court, we are at liberty to adopt that rule on the subject which seems to us the safest and wisest. at page 523.

It would appear that the safest and wisest course of action is to review the patent denial of the Petitioners' Equal Protection rights in the application of Double Jeopardy Standards.

CONCLUSION

For all the reasons stated herein, the petition for a writ of certiorari should be granted.

Dated: 5/23/96

Respectfully submitted,

DONALD F. MANNO
Counsel of Record
Kevon Office Center
2500 McClellan Avenue, Suite 140
Pennsauken, New Jersey 08109
(609) 665-6464
Attorney for Petitioners

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:	NO. 661 E.D. ALLOCATUR DKT. 1995
V.	:	Petition for Allowance of Appeal from the Superior Court
NICODEMO SCARFO, PETITIONER	:	
COMMONWEALTH OF PENNSYLVANIA	:	NO. 701 E.D. ALLOCATUR DKT. 1995
V.	:	Petition for Allowance of Appeal from the Superior Court
FRANK NARDUCCI, PETITIONER	:	
COMMONWEALTH OF PENNSYLVANIA	:	NO. 706 E.D. ALLOCATUR DKT. 1995
V.	:	Petition for Allowance of Appeal from the Superior Court
PHILIP NARDUCCI, PETITIONER	:	
COMMONWEALTH OF PENNSYLVANIA	:	NO. 700 E.D. ALLOCATUR DKT. 1995
V.	:	Petition for Allowance of Appeal from the Superior Court
JOSEPH LIGAMBI, PETITIONER	:	

COMMONWEALTH OF PENNSYLVANIA	:	NO. 708 E.D. ALLOCATUR DKT. 1995
V.	:	Petition for Allowance of Appeal from the Superior Court
NICHOLAS MILANO, PETITIONER	:	
COMMONWEALTH OF PENNSYLVANIA	:	NO. 651 E.D. ALLOCATUR DKT. 1995
V.	:	Petition for Allowance of Appeal from the Superior Court
SALVATORE MERLINO, PETITIONER	:	
COMMONWEALTH OF PENNSYLVANIA	:	NO. 694 E.D. ALLOCATUR DKT. 1995
V.	:	Petition for Allowance of Appeal from the Superior Court
FRANCIS IANNARELLA, JR., PETITIONER	:	

ORDER

PER CURIAM:

AND NOW, this 27th day of February, 1996, the Petitions for Allowance of Appeal are denied.

TRUE COPY FROM THE RECORD
ATTEST: February 27, 1996

/s/ Patricia Johnson
PATRICIA JOHNSON
Chief Clerk
Supreme Court of Pennsylvania
Eastern District

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
NIICODEMO SCARFO, Appellant	:	NO. 02284 PHILADELPHIA 1994

Appeal from the Order Entered June 10, 1994
In the Court of Common Pleas of Philadelphia County
Criminal Division, No. July Term 1987
3482-3511, 3494, 3495, 3497

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
FRANK NARDUCCI, Appellant	:	NO. 02470 PHILADELPHIA 1994

Appeal from the Order Entered June 10, 1994
In the Court of Common Pleas of Philadelphia County
Criminal Division, No. 8707-3482-3485

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
PHILIP NARDUCCI, Appellant	:	NO. 02471 PHILADELPHIA 1994

Appeal from the Order Entered June 10, 1994
In the Court of Common Pleas of Philadelphia County
Criminal Division, No. 8707-3498-3501 July Term, 1987

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JOSEPH LIGAMBI, Appellant	:	NO. 02472 PHILADELPHIA 1994

Appeal from the Order Entered June 10, 1994
In the Court of Common Pleas of Philadelphia County
Criminal Division, No. July Term 1987 3506-3511

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
NICHOLAS MILANO, Appellant	:	NO. 02500 PHILADELPHIA 1994

Appeal from the Order Entered June 10, 1994
In the Court of Common Pleas of Philadelphia County
Criminal Division, No. 88-12-1938-41

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
SALVATORE MERLINO, Appellant	:	NO. 02501 PHILADELPHIA 1994

Appeal from the Order Entered June 10, 1994
In the Court of Common Pleas of Philadelphia County
Criminal Division, No. July Term 1987, 3486-3488

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
FRANCIS IANNARELLA, JR.	:	NO. 02505 PHILADELPHIA 1994
Appellant	:	

Appeal from the Order Entered June 10, 1994
In the Court of Common Pleas of Philadelphia County
Criminal Division, No. 87-07-3490-3493

(Filed June 5, 1995)

Before: DEL SOLE, FORD ELLIOTT and CERCONE, JJ.

MEMORANDUM:

These appeals are from an order of the lower court denying appellants' pretrial motions to dismiss on double jeopardy grounds.[1] We affirm.

On April 5, 1989, appellants were convicted, after a jury trial, of first degree murder and related offenses. The victim, Frank D'Alfonso, was murdered in 1985. The Commonwealth had contended at trial that D'Alfonso's murder was ordered by appellant Nicodemo Scarfo, and was carried out by his co-defendants, alleged Mafia members. The Commonwealth sought the death penalty, but

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[1] These appeals are properly before us. In a criminal case, an immediate appeal may be taken from an order denying a pretrial motion to dismiss on double jeopardy grounds. *Commonwealth v. Rightley*, 421 Pa. Super. 270, 617 A.2d 1289 (1992); *Commonwealth v. Gains*, 383 Pa. Super. 208, 556 A.2d 870 (1989).

after evidence of one aggravating circumstance was presented, the defendants moved to withdraw the case as to the death penalty from the jury. The lower court accepted the motion, removed the death penalty deliberations from the jury, and sentenced appellants to life imprisonment. On appeal, this court reversed and remanded the case for a new trial. *Commonwealth v. Scarfo,* 416 Pa. Super. 329, 611 A.2d 242 (1992) [hereinafter *Scarfo*].[2] On remand, the defendants filed motions to dismiss on the grounds of double jeopardy violations, as well as other pre-trial motions. The trial court denied the motion on June 10, 1994. Appellants then filed these timely Appeals in which they raise the following issues:

1. Did appellants suffer double jeopardy as a result of the Commonwealth's continuous pattern of misconduct throughout the trial?

a. Was witness Eugene Milano secured as a witness by a series of ethical violations and was his "deal" with the Commonwealth deliberately delayed until jury selection was completed?

b. Was the use of evidence that the defendants had participated in another unrelated murder prejudicial?

c. Did the Commonwealth's use of evidence of a "making" ceremony which was irrelevant to the case establish a propensity on the part of appellant(s) to commit crimes?

d. Did the Commonwealth's reference to appellants as "wolves" in summation prejudice

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[2] Petition for allowance of appeal was denied. *Commonwealth v. Scarfo,* 535 Pa. 633, 631 A.2d 1006 (1993).

them and destroy the presumption of innocence?

Before addressing these issues, we will review the decision of the Superior Court in *Commonwealth v. Scarfo, supra,* as an understanding of the court's decision in the prior case is necessary for a proper evaluation of the issues raised in the instant appeal.

In *Scarfo, supra,* appellants presented several issues related to the decision of co-defendant Eugene Milano to cooperate with law enforcement officers and change his plea of not guilty. The Commonwealth announced Eugene Milano's decision to change his plea on the morning of March 15, 1989, after the jury had been selected and on the day opening arguments were to begin. Appellants argued that the trial court erred in failing to dismiss the charges against them after Eugene changed his plea and testified. The Honorable Vincent A. Cirillo, writing for the majority of the three judge panel, found on merit to this argument because the trial judge gave an adequate instruction on the matter. *Id.* at 371-72, 611 A.2d at 263. For similar reasons, the *Scarfo* majority,[3] per Judge Cirillo, rejected two other claims relative to Milano's change of plea.[4] Judge Cirillo found merit, however, to appellants'

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[3] The Honorable Kate Ford Elliott filed a dissenting opinion. *See infra.*

[4] Appellants argued that the trial court erred in allowing the prosecution to remind the jury about the change in the plea and that Eugene Milano had been a defendant. *Id.* at 372, 611 A.2d at 263. Appellants also alleged that it was error for the trial court to allow Eugene to testify regarding his discussions with the authorities about a plea arrangement for his brother, Nicholas Milano. *Id.* at 373, 611 A.2d at 263.

claim that Eugene Milano's change in plea may have resulted in the Commonwealth's intrusion into the defense's strategies, constituting a violation of appellants' Sixth Amendment right to counsel. The panel majority held that group defense preparations, such as the defense engaged in here, require "assurances that no government intrusions into the defense camp will occur." *Id.* at 378, 611 A.2d at 266. The panel found that the late notice of the change in plea along with the reports that plea negotiations between government agents and Eugene Milano had been on-going for approximately two weeks "raised a sufficient inference to warrant a finding that an intrusion may have occurred." *Id.* Judge Cirillo reasoned that because Eugene Milano had been seated with the defendants during voir dire, "he was exposed to the defense strategies in securing a desirable jury as well as to those decisions regarding potential defense positions on any matters discussed immediately prior to trial." *Id.* The panel majority concluded that where there is a "very real likelihood of prejudice to the defendant," as was the case here, a new trial is warranted. *Id.* at 379, 611 A.2d at 266-67.

The appellants in *Scarfo* also made numerous allegations of error in the admission of testimony and evidence. Appellants alleged that the trial court erred in allowing testimony which included references to prior criminal activity. Appellants claimed, *inter alia*, that the trial court erred in permitting references by the prosecutor to the appellants' status as "made" members of the Mafia, when testimony had revealed that in order to be a "made" member, one must have participated in a homicide. Judge Cirillo found that there was "no doubt that the references

to prior killings so tainted the jury's ability to objectively analyze the facts of the case that they were incapable of rendering a fair verdict." *Id.* at 392, 611 A.2d at 271. The panel majority determined that it was necessary to reverse the judgments of sentence as to appellants Scarfo, Lawrence and Salvatore Merlino, Francis Iannarella, and Frank Narducci because the prejudice caused by the prosecutor's references "far exceed[ed] their probative value." *Id.* at 389, 611 A.2d at 272.

The majority then found that the references at trial to "made" membership were *not* so prejudicial as to constitute reversible error as to appellants Philip Narducci, Joseph Ligambi, and Nicholas Milano. *Id.* at 393, 611 A.2d at 274. References to these three defendants as "made" Mafia members "were directly relevant to show their motive for the killing of Frank D'Alfonso." *Id.* Judge Cirillo indicated that the references to "made" membership were not evidence of prior criminal conduct with respect to these three defendants, but were evidence of their motive for the instant crime, and were therefore properly admissible as to those three. *Id.* Judge Cirillo distinguished these three defendants from the other five on the basis that these three "were 'made' as a reward for the killing of D'Alfonso, whereas, evidence that the other five were made members is not probative of the killing of D'Alfonso and is tantamount to eliciting evidences of prior killings." *Id.* at 393, 611 A.2d at 274.

The *Scarfo* majority also addressed appellant's allegations of prosecutorial misconduct during closing argument. Two of those allegations concerned the prosecutor's references to the defendants as (1) a "group of criminals," and (2) as "wolves, a wolf pack, and the

pack." *Id.* at 407, 611 A.2d at 281. The panel majority found that the reference to appellants as a "group of criminals" was a serious and prejudicial statement by the prosecution; however, the trial court's cautionary instruction to the jury on this reference was adequate. *Id.* at 410-11, 611 A.2d at 282.

The majority concluded that the prosecutor's references to the defendants as "wolves, wolf pack, pack," etc., warranted a mistrial. Judge Cirillo found that the comments "exceeded the bounds of propriety and constituted an appeal to the passions and prejudices of the jury." *Id.* at 412, 611 A.2d at 283 (quoting *Commonwealth v. Lipscombe*, 455 Pa. 525, 528, 317 A.2d 205, 205 (1974)). The prosecutor's comments were not justified by the fact that the defense first used animal imagery in closing. As Judge Cirillo stated:

> It is one thing for a defense attorney to attack a witness with certain debasing claims, but it is error for the prosecutor with authority of the Commonwealth to attack a person standing accused. A jury can sort out the truth when witnesses are assailed by such remarks. Where debasing epithets are hurled at the accused, however, the jury becomes indelibly marked or prejudiced to the point where its objective search for the truth becomes difficult, if not impossible.

Id. at 413, 611 A.2d at 284. The panel majority concluded that justice required a new trial because "the defendants were not properly treated with fundamental fairness." *Id.*

In a dissenting opinion, Judge Ford Elliott indicated that she would limit relief on the error raised by Milano's

change of plea to a hearing "to determine whether, in fact, any strategic or defense information was relayed." *Id.* at 416, 611 A.2d at 285 (Ford Elliott, J., dissenting). She would have found the evidence of "made" membership admissible as tending to establish motive or as "so intertwined or interrelated to the present offense such as to show Common plan, scheme or design." *Id.* (Ford Elliott, J., dissenting). Judge Ford Elliott would not have granted relief on the grounds of prosecutorial misconduct. She would have found the prosecutors closing argument to be "hard hitting and compelling rhetoric . . . within the bounds of responsive comment to the biblical references utilized by the defense in closing argument," and justifiable as "within the bounds of vigorous oratory permitted a prosecutor in closing argument." *Id.* at 418, 611 A.2d at 286. (Ford Elliott, J., dissenting).

In the instant appeal, appellants allege that their double jeopardy rights, as interpreted by this court in *Commonwealth v. Smith*, 532 Pa. 177, 615 A.2d 321 (1992), were violated by a "continuous pattern of misconduct" by the prosecution throughout the trial. Appellants contend that the "continuous pattern of misconduct" engaged in by the prosecution consisted of: (1) a series of ethical violations in securing the testimony of former defendant Eugene Milano; (2) introduction of evidence that certain of the appellants had previously participated in a homicide; (3) introduction of evidence of a "making" ceremony; and (4) the use of epithets in closing argument characterizing appellants as "wolves" and using related terms.

In *Commonwealth v. Smith, supra,* the Pennsylvania Supreme Court issued a new interpretation of the circumstances under which the double jeopardy clause will prohibit a re-trial of an accused. The rule prior to *Smith* was that "double jeopardy will attach only to those mistrials which have been intentionally caused by prosecutorial misconduct." *Commonwealth v. Simons,* 514 Pa. 10, 16, 522 A.2d 537, 540 (1987). In *Smith,* a schoolteacher, Susan Reinert, and her two children, were murdered. Appellant, the principal at Reinert's school and William Bradfield, Reinert's fiance and fellow teacher, were accused of conspiring to commit the crime in order to recover the proceeds of Reinert's insurance policies which named Bradfield as beneficiary. On appeal, the Pennsylvania Supreme Court determined that appellant was entitled to a new trial on the basis of the admission of impermissible hearsay evidence at trial. *Commonwealth v. Smith,* 523 Pa. 577, 568 A.2d 600 (1992).

The appellant in *Smith* subsequently filed a motion to preclude a new trial based on double jeopardy because of the existence of after-discovered evidence of prosecutorial misconduct. *Commonwealth v. Smith,* 532 Pa. at 180, 615 A.2d at 322. Both the trial court and the Superior Court held that they were constrained under the interpretation of the double jeopardy clause as stated in *Commonwealth v. Simons, supra,* to deny appellant's motion. *Commonwealth v. Smith,* 404 Pa. Super. 553, 559-60, 591 A.2d 730, 732-33 (1991).

The after-discovered evidence in *Smith* consisted of evidence that at the first trial, the prosecution's chief witness had denied the existence of any agreement with

the Commonwealth in exchange for his testimony. Appellant learned after trial that such an agreement did in fact exist. The other after-discovered evidence related to grains of sand that were found between the toes of the victim (Reinert) during her autopsy, and the Commonwealth's conduct in regard to that evidence. The grains of sand were very significant in terms of the theories of the parties at trial. The evidence would have supported the defense theory that the murder was committed in New Jersey, where Bradfield had been present but appellant was not. *Commonwealth v. Smith*, 532 Pa. at 181, 615 A.2d at 322-23.

One of the Commonwealth witnesses at the *Smith* trial testified on cross-examination that he had been present during Reinert's autopsy, and had used "adhesive lifters" to remove granular pieces of material that looked like sand from between the toes of the victim. The Commonwealth implied at trial that this witness had lied, and even recommended considering charging the witness with perjury. During Smith's trial, the Pennsylvania state police found the missing adhesive lifters in an evidence locker. The Commonwealth suppressed this evidence for more than two years, and continued to pursue affirmance of the death sentence while Smith appealed. The attorney general's office (which had prosecuted Smith) finally notified defense counsel that the missing adhesive lifters had been found. *Id.* at 182-83, 615 A.2d at 323-24.

On appeal of the trial and Superior Court decisions to deny relief under the then-existing double jeopardy law, the Pennsylvania Supreme Court held that the circumstances surrounding the after-discovered evidence in *Smith* "implicate[d] the double jeopardy clause of the

Pennsylvania Constitution." *Id.* at 186, 615 A.2d at 325. The court concluded:

> We now hold that the double jeopardy clause of the Pennsylvania Constitution prohibits retrial of a defendant not only when prosecutorial misconduct is intended to provoke the defendant into moving for a mistrial, *but also when the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial.* Because the prosecutor's conduct in this case was intended to prejudice the defendant and thereby deny him a fair trial, appellant must be discharged on the grounds that his double jeopardy rights, as guaranteed by the Pennsylvania Constitution, would be violated by conducting a second trial.

Id. (emphasis added). It is on this holding by the Pennsylvania Supreme Court that the appellants in the instant case rely.

The Commonwealth contends that the Pennsylvania Supreme Court's holding in *Smith* is limited to cases in which the prosecutor intentionally conceals exculpatory evidence, and therefore is inapplicable to the instant case. They base this contention on the *Smith* court's statement at the beginning of its opinion, "At issue is whether the double jeopardy clause bars retrial following intentional prosecutorial misconduct designed to secure a conviction through the concealment of exculpatory evidence. . . . " *Commonwealth v. Smith*, 532 Pa. Super. at 179, 615 A.2d at 322. The Commonwealth also cites *Commonwealth v. Martorano*, 535 Pa. 178, 634 A.2d 1063 (1993) (per curiam) in support of this position.

In *Martorano,* appellants were convicted of first degree murder and were sentenced to life imprisonment. On appeal, the Superior Court awarded appellants a new trial. *Id.* at 182, 634 A.2d at 1064. They petitioned the lower court for bail, which the lower court denied. On appeal of this denial to the Pennsylvania Supreme Court, appellants raised the issue of whether the Commonwealth was precluded from seeking the death penalty on retrial. *Id.* at 187, 634 A.2d at 1067. The Supreme Court discussed federal constitutional principles of double jeopardy and found that because the jury had been deadlocked on whether to impose the death penalty, it therefore had made no decision on the issue. *Id.* at 194, 634 A.2d at 1070. Because of this, there could be no "acquittal on the merits" on the death penalty issue. Therefore, under federal constitutional double jeopardy principles, the Commonwealth could again seek the death penalty. *Id.*

The *Martorano* court then determined that although appellants had made a passing reference in their brief to state constitutional principles of double jeopardy, they presented no argument on the subject and therefore the issue was waived. *Id.* at 194-95, 634 A.2d at 1071. The court noted, however, that even if the issue had been properly raised, they would not have accepted appellants' argument. *Id.* at 195, 634 A.2d at 1071. The court reasoned:

> We believe that the federal approach to this issue is a sound one. It accords respondents the right to a fair trial, while preserving society's interest in imposing the appropriate punishment on one who has been convicted after obtaining

> such a trial. Moreover, contrary to what respondents imply, our recent decision in *Commonwealth v. Smith*, 532 Pa. 177, 615 A.2d 321 (1992), does not require that we decide otherwise. *The issue in that case was whether the appropriate sanction is discharge when a prosecutor intentionally withholds exculpatory evidence to secure a conviction in a capital case. Smith* does not address the issue which is now before this court. Therefore, it provides no guidance about whether jury deadlock precludes imposition of the death penalty upon retrial.

Commonwealth v. Martorano, 535 Pa. at 195, 634 A.2d at 1071 (emphasis added).

The Commonwealth relies on the highlighted portion of the *Martorano* opinion to support its view that the *Smith* case is limited to the precise circumstances of that case. We interpret *Martorano* as indicating that the courts will not apply *Smith* in cases which present double jeopardy issues which have nothing to do with prosecutorial misconduct. We do not read *Martorano* as saying definitively, however, that *Smith* will not apply in any instance except that of prosecutorial concealment of exculpatory evidence. The analysis in *Martorano* is too limited to permit such a conclusion, especially in light of the broadly worded holding of the *Smith* court.

Other panels of this court which have addressed the applicability of *Smith* have not precluded its consideration simply because there was no issue of concealment of exculpatory evidence present. In *Commonwealth v. Rightley*, 421 Pa. Super. 270, 617 A.2d 1289 (1992), appellant was granted a new trial after being convicted of

simple and aggravated assault. Several incidents of prosecutorial misconduct formed the basis for the grant of a new trial. *Id.* at 275, 617 A.2d at 1290-91. Those incidents included "the prosecutor's 'intentional misrepresentation' that a witness had related inconsistent accounts of the incident in question and certain improper statements made by the prosecutor during his closing argument." *Id.* at 275, 617 A.2d at 1292. Rightley argued on remand that the instances of prosecutorial misconduct barred his retrial under *Smith*. The *Rightley* court held that *Smith* did not bar reprosecution because in the original appeal, the Superior Court had not held that the prosecutorial misconduct, consisting in part of an overzealous prosecutor exceeding the bounds of cross-examination, was intended to deprive Rightley of a fair trial. *Id.* at 279, 617 A.2d at 1294. The court held that since Rightley had objected at trial to the prosecutor's misconduct,

> it can hardly be argued that this conduct [was] subversive. This is not the type of prosecutorial conduct which *Smith* is intended to sanction.

Id. at 280, 617 A.2d at 1294. The *Rightley* court also determined that the improper comments of the prosecutor "were not designed to deprive defendant of a fair trial." *Id.* The court stated, "We do not read *Smith* to imply that when a trial judge exercised his discretionary function in granting a mistrial on the basis of an improper prosecutorial comment, a new trial is barred." *Id.*

This court also construed the applicability of *Smith* in *Commonwealth v. Moose*, 424 Pa. Super. 579, 623 A.2d 831 (1993). Defendant was charged with rape and murder. His counsel filed a motion for discovery requesting copies of all statements made by defendant, his co-defendant, and

any witnesses, as well as police reports and any exculpatory information in the Commonwealth's possession. The district attorney did not turn over a statement given by one Oglesby which attributed to Moose incriminating statements made while both Moose and Oglesby were in the county prison. *Id.* at 581, 623 A.2d at 832. Oglesby had an agreement with the Commonwealth to convey information in exchange for a lenient sentence; pursuant to this agreement, Oglesby told the Commonwealth about Moose's confession. *Id.* Moose made two other requests for discovery, but the district attorney did not disclose Oglesby's statement until the first day of trial. The trial court precluded use of the statement, but at trial, the court without explanation permitted Oglesby to testify in rebuttal of Moose's testimony. *Id.* at 582, 623 A.2d at 833.

On appeal of his conviction, this court granted Moose a new trial on the basis that the Commonwealth had taken a statement from Moose, via Oglesby, in violation of Moose's Sixth amendment right to counsel. *Id.* at 583, 623 A.2d at 833. The Pennsylvania Supreme Court affirmed, noting that it had a "deep concern over the conduct of the Commonwealth in this instance," and referred the matter to the Disciplinary Board for consideration. *Id.* at 583, 623 A.2d at 834 (quoting *Commonwealth v. Moose*, 529 Pa. 218, 240 n.12, 602 A.2d 1265, 1276 n.12 (1992)).

Before the case in *Moose* could be retried, appellant filed a motion to dismiss on grounds of double jeopardy based on *Smith*. The trial court denied the motion. On

appeal to this court, the panel affirmed, holding as follows:

> The misconduct in this case is not such that Moose was provoked to move for mistrial. Nor can it be construed to be conduct that intentionally deprived Moose of a fair trial. After repeated requests, the Commonwealth failed to disclose Oglesby's identity or the existence of his statement until the first day of trial. Additionally, the existence of the "understanding" between the Commonwealth and Oglesby was not disclosed until after Moose's conviction. If it had been disclosed, Oglesby's credibility would have been tested by cross-examination. By failing to timely reveal the existence of the agreement, the Commonwealth knowingly foreclosed Moose from attempting to create in the minds of the factfinder the existence of a reasonable doubt arising from Oglesby's motivation for testifying. Accordingly, the appropriate remedy is a new trial. . . .
>
> We have already determined that Moose's Sixth Amendment rights were violated by the district attorney's behavior . . . We do not find, however, that this is equivalent to a specific intention to deprive the defendant of a fair trial, as in *Smith*.
>
> The prosecution in *Smith* deliberately withheld for four years clearly exculpatory evidence that was crucial to Smith's potentially successful defense. The Commonwealth in *Smith* continued to seek the death penalty while it continued to conceal the exculpatory physical evidence. The misconduct in this case, however, consisted of violations of the criminal discovery rules and the *Brady* doctrine. The prosecution in Moose's

> case did inform the court and defense counsel of Oglesby's statement, albeit at the last minute. Thus, the prosecutor's conduct, while egregious, does not rise to the level of subversive tactics present in *Smith*. In this case, it may fairly be stated that the prosecutor reprehensibly attempted to gain the upper hand by making a last-minute disclosure. There is no evidence here, as there was in *Smith*, that the Commonwealth intended to forever conceal Oglesby's statement. Moreover, the result of withholding Oglesby's statement is not the same as in *Smith*, where a crucial piece of physical evidence clearly exculpatory to the defendant was withheld. As a result of defense counsel's objection, Oglesby's statement was precluded. Nonetheless, the trial court without explanation subsequently allowed Oglesby to testify during trial. This was error. It is not a case, however, where the evidence and misconduct at trial show a clear, calculated orchestration by the prosecution to deny Moose a fair trial. Therefore, Moose is not entitled to discharge under *Smith*.

Id. at 588-89, 623 A.2d at 836-37.

In *Commonwealth v. Manchas*, 430 Pa. Super. 63, 633 A.2d 618 (1993), the Commonwealth's failure to disclose the existence of a witness who would inculpate appellant until six days prior to trial was held to not constitute a *Smith* violation. The court held that the Commonwealth's error did not deny appellant a fair trial where the misconduct involved the prosecutor's failure to fully comply with the rules of discovery, and the record demonstrated that appellant was not prejudiced by the violation. *See also Commonwealth v. Francis*, ___ Pa. Super. ___, 648 A.2d 49 (1994) (*Smith* does not bar retrial where record reveals

an "unfortunate misunderstanding of the highly complicated field of genetic testing" by the prosecutor, the court, and defense counsel which caused the three to agree to a test which could not provide the desired result; the prosecutor's actions were not misconduct). In *Commonwealth v. Santiago*, ___ Pa. Super. ___, ___ A.2d ___ (1994) (No. 3757 Phl. 1992, filed December 7, 1994), on remand following the award of a new trial, the trial court granted appellant's motion to dismiss on double jeopardy grounds because the prosecutor had failed to disclose to the defense the statement of an eyewitness who had exculpated appellant, but later recanted his story, and the statements of persons whose observations were inconsistent with the Commonwealth's theory of the case. On appeal, this court considered whether the Commonwealth's failure to disclose the evidence under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), amounted to a violation of *Smith* such that the Commonwealth would be precluded from retrying appellant under the double jeopardy principles set forth in that case. The *Santiago* panel held:

> [T]he withholding of evidence from the defense in the instant case, even if material, did not approach the egregrious nature of the prosecutorial misconduct which was before the Supreme Court in *Commonwealth v. Smith, supra.* As we have previously discussed at length, there was no violation of *Brady v. Maryland, supra,* in this case. However, even if we were to assume that some or all of the nondisclosed information was withheld in violation of *Brady,* we can find no evidence of record that the prosecution acted in bad faith or that it possessed a specific intent to deny Santiago a fair trial. In

> the absence of such a bad faith intent to deny the defendant a fair trial, even intentional prosecutorial misconduct would not violate the Double jeopardy Clause of the Pennsylvania Constitution so as to bar a retrial of the defendant. With respect to such violations, a new trial is an adequate remedy.

Id. at ___, ___ A.2d at ___ (slip op. at 57-58).

We think it is clear from the above cases that there is no hard and fast rule that *Smith* will be applied only to cases of prosecutorial concealment of exculpatory evidence. It is apparent that the appellate courts are taking a case-by-case approach to the issue of whether *Smith* will bar retrial in instances of prosecutorial misconduct resulting in the award of a new trial. Following this case-by-case approach, we will consider the applicability of *Smith* to the facts of this case.

Appellants first contend that the double jeopardy principles espoused in *Smith* bar their retrial because the Commonwealth engaged in misconduct in securing defendant Eugene Milano as a witness at trial. The appellants argue that Eugene Milano's cooperation was secured by a series of ethical violations on the part of the Commonwealth, and that these alleged violations, alone or in combination with the other instances of prosecutorial misconduct, bar retrial under *Smith*. We find no merit to this claim.

Appellants contend that the Commonwealth engaged in a series of ethical violations related to Eugene Milano's change in plea which amounted to prosecutorial misconduct in contravention of *Smith*. Specifically, appellants

contend that the Commonwealth violated DR7-104 (A)(1) of the Rules of Professional Conduct:

> During the course of his representation of a client a lawyer shall not: (1) communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other part or is authorized by law to do so. . . .

See Rules of Professional Conduct, Rule 4.2 (the "anti-contact" rule).

The Rules of Professional Conduct do not have the force of law. *Estate of Pedrick*, 505 Pa. 530, 482 A.2d 215 (1984) (plurality); *Commonwealth v. Stenhach*, 356 Pa. Super. 5, 514 A.2d 114 (1986), *appeal denied*, 517 Pa. 589, 534 A.2d 114 (1987).

> [The] ethical obligations of the lawyer . . . are not to be considered as substantive law in the context of criminal proceedings, serving instead as a regulatory guide and basis for disciplinary action within the legal profession.

Id. at 13, 514 A.2d at 118. Thus, even if appellants are correct that the Commonwealth violated an ethical rule in its conduct related to Eugene Milano's guilty plea, such ethical violation would not provide appellants the substantive relief they seek in the form of a bar to retrial on grounds of double jeopardy. The remedy for an attorney's violation of the Rules of Professional Conduct is obtained through a disciplinary proceeding before the Disciplinary Board of the Pennsylvania Supreme Court. *See* Pennsylvania Rules of Disciplinary Enforcement, Rule 201 (setting

forth exclusive jurisdiction of the Pennsylvania Supreme Court and Disciplinary Board for attorney misconduct). Under present law, the disciplinary rules do not create substantive rights in parties to a legal action; they are a procedural means for the legal profession to regulate its members' conduct.[5]

Appellants rely on *U.S. v. Lopez*, 765 F. Supp. 1443 (N.D.Cal. 1991), *vacated* 4 F.3rd 1455 (9th Cir. 1993) in support of their position that a prosecutor's violation of the anti-contact rule (DR1-104 (A)(1)) constitutes prosecutorial misconduct which violates our Supreme Court's holding in *Smith*. In *Lopez*, the prosecutor participated in a series of secret meetings with defendant Lopez, who was represented by counsel, concerning plea negotiations. Counsel for Lopez was not aware of the meetings. The United States District Court for the Northern District of California found that the government violated DR 7-104, the "anti-contact" rule, supra, by this conduct. *Id.* at 1449, 1456. The court found that the government's conduct was "flagrant and egregious," and that Lopez was prejudiced by it. Id. at 1461. Further, the court determined that in the exercise of its "supervisory powers,"

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[5] *See* Rules of Professional Responsibility (1988), Scope:

> Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies . . . [N]othing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

i.e., the authority to police the attorneys who appear before the court, it was empowered to enforce the "anti-contact" rule. *Id.* at 1452-55. The district court determined that dismissal of the indictment against Lopez was the appropriate remedy for the prosecutor's violation of the disciplinary rule, because any remedy short of that would not "have any significant deterrent effect on future government misconduct of the type found in this case." *Id.* at 1456-64.

On appeal, the Court of Appeals for the Ninth Circuit agreed that the prosecutor's actions were unauthorized and were a violation of the disciplinary rule. *United States v. Lopez*, 4 F.3d 1455, 1460-63 (1993). However, the Court of Appeals determined that the district court had abused its discretion in dismissing the indictment against Lopez because there had been no showing of substantial prejudice to him. Since Lopez had been able to secure new and able counsel to replace his former counsel who had withdrawn due to the misconduct of the prosecution, the Court of Appeals held that lesser sanctions, such as holding the prosecutor in contempt or referring him to state bar disciplinary proceedings, was the appropriate remedy. *Id.* at 1464. Therefore, the Court of Appeals vacated the district court's order and remanded the case for further proceedings. *Id.*

Appellants' use of *Lopez* as authority is misplaced. First, appellants cite the decision of the U.S. District Court, which was later vacated by the Ninth Circuit Court of Appeals. Thus, the theory upon which appellants rely was overturned on appeal. In addition, this court is not bound by the decision of either the Northern District of California or the Ninth Circuit Court of

Appeals. *Commonwealth v. Giffin*, 407 Pa. Super. 15, 595 A.2d 101 (1991) (in the absence of a ruling by U.S. Supreme Court, decision of federal district court or federal intermediate appellate court is not binding on Pennsylvania courts; decisions of federal district courts are not binding even when they concern federal questions; Pennsylvania courts are not bound by decisions of inferior federal courts where the case specifically concerns Pennsylvania law); *Cianfrani v. Johns-Manville Corporation*, 334 Pa. Super. 1, 482 A.2d 1049 (1984) (accord). Appellant's allegations of ethical violations by the prosecution in this case do not provide a basis for relief under *Smith*.

Appellants also contend that the length of the negotiations related to Eugene Milano's plea produced an inference that the Commonwealth engaged in deliberate delay, and that the Commonwealth did not erect a "barrier" to prevent Eugene Milano from discussing defense strategy with the prosecution. Appellants contend that these actions are prosecutorial misconduct in violation of *Smith*.

In *Scarfo*, the majority awarded a new trial on the basis that there was a "very real likelihood of prejudice" to appellants as a result of the circumstances surrounding Eugene Milano's change in plea. The majority identified those circumstances as the "late notice" of Eugene Milano's decision to plead guilty, "suggestions by defense counsel that reports indicated plea negotiations . . . had been on-going for approximately two weeks," and "the fact that Eugene sat with and could participate with the defendants in jury voir dire prior to trial." *Commonwealth v. Scarfo*, 416 Pa. Super. at 378 & 380 n.25, 611 A.2d at 266 & 267 n.25. The *Scarfo* majority, however, did not base its

conclusion on any actual proof or evidence of prejudice. In fact, the majority found it "inconsequential" for the court to determine whether information about defense strategy had been conveyed to the prosecution through Eugene Milano. *Id.* at 378, 611 A.2d at 266. The majority noted that it was "entirely possible that no strategic defense information was relayed by Eugene Milano to the prosecution," but held that the constitutional mandate of effective assistance of counsel required the court to *presume* the likelihood of prejudice under the circumstances surrounding Milano's plea. *Id.* at 379-80, 611 A.2d at 267.

The fact that the *Scarfo* majority relied on "presumed" rather than "actual" prejudice is significant to whether this case involved prosecutorial misconduct of the *Smith* type. In *Smith,* there was actual evidence that the prosecution had knowingly concealed exculpatory physical evidence and had only reluctantly informed defense counsel of the existence of the evidence. In this case, appellants allege only an "inference" that the prosecution may have deliberately delayed revealing Milano's change of plea in order to use Milano to discover defense secrets. In contrast to the actual evidence of intentional prosecutorial misconduct in *Smith,* the present case involves only presumptions and inferences of "possible" or "likely" prosecutorial misconduct. The majority's characterization in this case of the "likelihood of prejudice" as "very real" does not rise to the level of actual proof or evidence of prosecutorial misconduct. Without evidence that Eugene Milano actually revealed defense secrets to the prosecution and that the prosecution actually delayed Milano's plea of guilty in order to use Milano to obtain defense secrets, we cannot conclude that this case

involves egregregious [sic] prosecutorial misconduct as in *Smith*.[6] Thus, appellants' allegations about the length of delay in disclosing Milano's intention to plead guilty, as well as their contentions concerning the alleged lack of a barrier to prevent the disclosure of defense information do not amount to prosecutorial misconduct violative of

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[6] Although the decision of the majority in the prior appeal constitutes the law of the case, we find it necessary to point out that the authority upon which the majority relied for its conclusion that a "real likelihood of prejudice" existed is distinguishable from the present case. The majority in *Scarfo* relied on *U.S. v. Rispo*, 460 F.2d 965 (3rd Cir. 1972) for this conclusion. *Rispo*, however (as well as other authority cited by the majority), involved a situation in which a paid government informant infiltrated the defense camp. The *Rispo* court found the government's conduct to be shocking and granted Rispo a new trial. *Id.* at 978. In the instant case, Eugene Milano has never been identified as a government informant. The authorities upon which the *Scarfo* majority relied do not speak to the situation where, as here, a co-defendant who is not an identified government agent, makes a decision to plead guilty. *See, e.g., Weatherford v. Bursey*, 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977) (undercover agent's participation in pretrial conference between accused and his attorney did not violate accused's sixth amendment right to effective assistance of counsel without demonstration or threat or specific prejudice); *United States v. Kilrain*, 566 F.2d 979 (5th Cir. 1978), *cert. denied*, 439 U.S. 819, 99 S.Ct. 80, 58 L.Ed.2d 109 (1978) (co-defendants' convictions affirmed where former paid government informant pled guilty and then testified at trial; informant did not relate any information obtained through informant status); Note, *Government Intrusions into the Defense Camp: Undermining the Right to Counsel*, 97 Harv. L.Rev. 1143 (1984) (focus of note is on government use of informants and electronic surveillance to penetrate the privacy of communications between criminal defendants and their attorneys).

Smith in the absence of actual proof that the Commonwealth sought and obtained defense information by virtue of Milano's decision.

Appellants contend that Eugene Milano's testimony at the evidentiary hearing conducted by the lower court on remand demonstrates that "the Commonwealth cannot make a showing to the effect that no defense strategy or secrets reached the prosecution from Eugene Milano." Brief for Appellant Nicodemo Scarfo, at 32. We had reviewed the testimony given at the hearing conducted on April 27, 1994. We agree with the trial court's interpretation of Mr. Milano's testimony at that hearing:

> Finally, Mr. Milano reiterated under oath that he was neither asked specifically about defense strategy (N.T., Pre-trial Hearing, p. 35-36), nor was he required to divulge any information regarding the defense strategy as a condition of his agreement. (N.T., Pre-trial Hearing, p. 54-55). The court, finding the manner and content of Mr. Milano's testimony to be credible, correctly determined that Mr. Milano's continued presence with the defendants after he decided to enter a guilty plea did not constitute an invasion into the defense camp, and that the evidence that Mr. Milano would offer at re-trial would be admissible. Thus, while the possibility for prejudice existed, no actual prejudice inured to the defendants because of Milano's decision.

Trial Court Opinion, September 9, 1994, at 11.

Appellants next contend that the admission at trial of evidence that certain of the appellants had engaged in a prior homicide, and admission of evidence of a "making" ceremony were prosecutorial misconduct prohibited by

Smith. There is nothing in the majority opinion in *Scarfo* which would indicate that the majority found the admission of this evidence to constitute the egregious type of prosecutorial misconduct condemned in *Smith*. The majority determined that the prosecution had no "compelling need" to introduce this evidence, and that a less prejudicial trial strategy could have been employed. *Id*. at 391, 611 A.2d at 272. They also found that the prejudicial nature of the evidence far outweighed its probative value, thus justifying a new trial as to certain of the defendants. As to three of the defendants, however, the majority determined that the evidence was admissible as proof of motive for the instant charges.

In this discussion, the majority in *Scarfo, supra*, did not determine that the Commonwealth's behavior was intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial. *See Commonwealth v. Smith, supra*. The Commonwealth's conduct did not rise to the level of intentional concealment of exculpatory evidence, as engaged in by the prosecution in *Smith*. As stated in *Rightley, supra*, "[e]very act on the part of a rational prosecutor is meant to 'prejudice' the defendant by placing before the judge or jury evidence leading to a finding of guilt." 421 Pa. Super. at 280, 617 A.2d at 1294 (quoting *Oregon v. Kennedy*, 456 U.S. 667, 674, 102 S.Ct. 2083, 2089, 72 L.Ed.2d 416, 424 (1982)). There is no evidence here, as there was in *Smith*, that the prosecution's strategy in seeking admission of the disputed evidence, was "actually designed to demean or subvert the truth seeking process." *Id*. Thus, the prosecutor's actions in seeking admission of this evidence does not bar a retrial under *Smith*.

Appellants' final contention on appeal is that the Commonwealth's misconduct in using the terms "wolves," "wolfpack," etc., in closing argument in the type of misconduct which will bar appellant's retrial under *Smith*. We disagree. As the *Scarfo* majority indicated in the prior appeal of this case:

> We understand that a Commonwealth attorney, embroiled in the heat of a trial of notorious defendants feels especially compelled to attain a conviction. Still a prosecutor may not, at the same time he or she so dutifully represents the public's interest, fracture the right of a fair trial for the accused. Such infractions, unintentional though they may be and prompted by the stress of a high-profile case, are prejudicial nonetheless.

Commonwealth v. Scarfo, 416 Pa. Super. at 414, 611 A.2d at 284.

This excerpt from the majority opinion in *Scarfo* makes clear that the panel majority did not find that the Commonwealth's use of the objectionable terms in closing argument was intentional. Rather, the court obviously believed the Commonwealth's conduct was unintentional and motivated by "the heat of trial." It is also clear from the majority and dissenting opinions in *Scarfo* that the Commonwealth's closing argument, though improper and prejudicial as determined by the majority, was prompted by arguments made during closing by the defense. Thus, it is clear that the comments were not

made with the type of improper intent which characterized the actions of the *Smith* prosecution.[7] Accordingly, we cannot find that appellants are entitled to a bar of their retrial on the basis of double jeopardy.

For all of the above reasons, we find no merit to appellants' contentions on appeal.

Order affirmed. Case remanded to lower court for further proceedings. Jurisdiction relinquished.

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[7] As Judge Ford Elliott's dissenting opinion in *Scarfo* demonstrates, there was disagreement as to whether the prosecutor's use of language was improper under the circumstances.